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MAR 29 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 962

JOHN N. THOMPSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Statutes and Rules Involved 5
Statement of Case 5
Reasons for Granting Writ 8

Argument—

I. Petitioner did not waive his right to be tried in the district of his residence 10

II. The court erred in overruling petitioner's Motion for Summary Judgment 18

III. No right of action exists in favor of the United States against petitioner; but assuming such right does exist, it is barred under 31 U.S.C. 129, 31 U.S.C. 122, 44 U.S.C. 374, and 44 U.S.C. 380 20

IV. The United States cannot recover payments made by mistake to petitioner when such recovery was attempted after petitioner had irrevocably changed his position in reliance thereon and which would also be barred by statute of limitations 34

Conclusion 36
Appendix A—Opinion Below A1
Appendix B—Statutes Involved A7
Appendix C—Rules Involved A10

Authorities

CASES:

Amerio Contact v. *Knowles*, 274 F.2d 590 (C.A. D.C.) 19
Badeau v. *United States*, 130 U.S. 439 27, 29, 35
Bayne v. *United States*, 195 Fed. 236 27
Beneficial Industrial Loan Corp. v. *Kline*, (D.C. Ia. 1941) 41 F. Supp. 854 15
Blackmar v. *Guerre*, (1952) 342 U.S. 512, 96 L. Ed. 534 12
Blank v. *Bitker*, 7 Cir., 135 F.2d 962, 966 13
Bowles v. *Underwood Corp.*, (D.C. Wis. 1945) 5 F.R.D. 25 14
Brotherhood of Locomotive v. *Graham*, (C.A. D.C. 1948) 175 F.2d 802 11
C-O-Two Fine Equip. Co. v. *Barnes*, (C.A. 7, 1952) 194 F.2d 410, cert. den. 343 U.S. 925 10
Carr v. *United States*, 98 U.S. 438 30
Cohen v. *Beneficial Industrial Loan Corp.*, 93 F. Supp. 418 12
Columbus v. *Union Pac. R.R.*, 137 Fed. 869 26-27
Devier v. *George Cole Motor Co.*, (D.C. Va. 1939) 27 F. Supp. 978 15
Dow Chemical Co. v. *Melton Corp.*, (1960, C.A. 4 N.C.) 281 F.2d 292 13
Duval v. *Bathrick*, (1940, D.C. Minn.) 31 F. Supp. 510 12
E.P.I. Dupont DeNemours & Co. v. *Davis*, 264 U.S. 456 25
Espy v. *Cincinnati Bank*, 21 L. Ed. 947 34
Fairhope Fabric v. *Mohawk*, (1956, D.C. Mass.) 140 F. Supp. 313 12
Fidelity & Deposit Co. of Md. v. *Krout*, (C.C.A. 2d 1945) 146 F.2d 531 15
Frye v. *Batavia*, (D.C. D.C. 1943) 8 F.R.D. 384 13, 14
Gaines v. *Gaines*, (C.A. 1946) 157 F.2d 521, 81 U.S. App. D.C. 260 15

Girard Trust Co. v. *Harrington*, 23 Pa. Sup. 615, 620 34
Hays v. *Livermont*, (C.A. D.C. 1960) 279 F.2d 818 10
Heiss v. *Nielsen*, (1955, D.C. Neb.) 132 F. Supp. 541 12, 16
Hibbs v. *Beall*, 41 App. 592 (D.C.) 34-35
Hubbard v. *Hickman*, 96 Am. Dec. 297 34
In re Minot Auto, (8 C.A. 1924) 298 Fed. 853 10, 26, 33
International Refugee Org. v. *Bank of America*, 86 F. Supp. 884 10
Iowa v. *Carr*, (C.A. 8, 1911) 191 Fed. 257 10, 30, 32
Iowa v. *Creighton*, 191 Fed. 270 27
Jones v. *Radio Corp. of America*, (D.C. N.Y.) 129 F. Supp. 440 19
Jones v. *Watts*, 142 F.2d 575 (5 C.A. 1944) cert. denied 323 U.S. 787 10, 26, 33
Kaufman v. *U. S.*, (1940, D.C. D.C.) 35 F. Supp. 900 12
Keil Lock Co. v. *Earle Hardware*, (D.C. N.Y., 1954) 16 F.R.D. 388 17
Lance v. *United States*, 190 F.2d 204, cert. den. 342 U.S. 915 25
Lisle Mills, Inc., v. *Arkay Infants Wear, Inc.*, (1950, D.C. N.Y.) 90 F. Supp. 676 13
Lyon v. *G.M. Corp.*, (D.C. Ill., 1961) 201 F. Supp. 89 15
Mitchell v *Birkett*, (D.C. Ark. 1960) 184 F. Supp. 291 23
Mizrahi v. *Pandora Frocks*, (D.C. N.Y. 1949) 86 F. Supp. 958 13-14
Orange Theatre Corp. v. *Rayherstz Amusement Corp.*, 3 Cir., 139 F.2d 871, 874 13
Orr v. *United States*, (C.A. N.Y. 1949) 174 F.2d 577 10
Phoenix Electronics v. *U. S.*, 164 F. Supp. 614 25
Pinesich v. *Miller*, (D.C. Pa. 1950) 89 F. Supp. 539 10
Point Landing v. *Alabama Dry Dock*, (5 C.A. 1958) 261 F.2d 861 26
Prudencio v. *Hanselmann*, (1959, D.C. Minn.) 178 F. Supp. 887 15
Prudential Ins. Co. v. *McKee*, 81 F.2d 508 9, 12

Rensing v. *Turner*, 166 F. Supp. 790 ..... 11, 19
Riley v. *Union Pac. R. Co.*, (C.A. Ill. 1949) 177 F.2d 673 10
Robertson v. *Railroad Labor Bd.*, 268 U.S. 619 11
Sadler v. *Pennsylvania Ref. Co.*, (1940 D.C. S.C.) 33 F. Supp. 414 17
Saunders v. *U. S.*, (D.C. N.H. 1945) 59 F. Supp. 689 12
Schiller v. *Mit-Clip Co.*, (C.A. N.Y.) 180 F.2d 654 19
Schlaefer v. *Schlaefer*, (1940) 112 F.2d 177, 71 App. D.C. 350, A.L.R. 1014 15
Schnell v. *Eckrich*, 365 U.S. 260, 5 L. Ed. 2d 546, p. 1063 (1961) 12
Shall v. *Henry*, (C.A. 7 Ill. 1954) 211 F.2d 226 ..... 9, 14
Shipman v. *D. C.*, 119 U.S. 148 34
Skilling v. *Funk Aircraft*, 173 F. Supp. 939 (D.C. Mo., 1959) 10, 19
Smith v. *Clay*, 3 Brown, Ch. 639 31
Speir v. *Robert C. Herd & Co.*, (1960, D.C. Md.) 189 F. Supp. 436 13
Stamation v. *Miller*, 88 F. Supp. 556 (D.C. Pa., 1949) 10, 19
State v. *Milk*, 11 Fed. 389 27
Synthetic Patents Co. v. *Sutherland*, 22 F.2d 494 (cert. den. 276 U.S. 630) 34
Texarkana Casket v. *Binswager*, 3 F.2d 611 34
The Davis, 10 Wall. 17 28
The Falcon, 19 F.2d 1014 32
The Siren, 7 Wall. 159 28
Trust v. *Gilpin*, 235 Pa. 524 34
Union Savings v. *Kehlor*, 7 Mo. App. 158 34
United States v. *Bank of America*, 47 F. Supp. 279 (Calif. 1942) 27
United States v. *Fidelity Baltimore Bank*, (1959) 173 F. Supp. 565 ..... 27, 32, 33
United States v. *Johnston*, (N.Y. C.A., 1888) 124 U.S. 236 ..... 10, 29

United States v. *Lorknit Mfg. Co.*, 189 F.2d 454, cert. den. 342 U.S. 915 25
United States v. *Maryland Cas.*, 235 F.2d 50 (C.A. Fla. 1956) 5 Cir. 10, 26, 32
United States v. *Royer*, 268 U.S. 394 27
United States v. *Stinson*, 125 Fed. 907, aff. 197 U.S. 200 10, 27, 30, 32
United States v. *Winegar*, (C.A. Utah 1958) 254 F.2d 693 24
United States v. *W. H. Kistler Stationery Co.*, 200 F.2d 805 (C.A. Colo. 1953) 25
Untersinger v. *United States*, (1949) 172 F.2d 298 9, 12
Utah Power Co. v. *United States*, 230 Fed. 328 27
Walker v. *United States*, 139 Fed. 409 (aff. 148 Fed. 1022) 10, 27, 31, 32, 35
Walsh v. *United States*, 81 F. Supp. 667 13
Wilt v. *Smack*, (D.C. Pa. 1957) 147 F. Supp. 700 10
Young v. *Aetna Life Ins. Co.*, (D.C. Pa. 1940) 32 F. Supp. 389, aff. 113 F.2d 601 15

FEDERAL STATUTES—

28 U.S.C. 1391 (b) 10, A7
28 U.S.C. 1406 (a) 10, 19, A7
29 U.S.C. 255 and (a) A7
31 U.S.C. 122 3, 8, 20, 22, 25, A7
31 U.S.C. 129 3, 8, 20, 25, A8
44 U.S.C. 374 4, 9, 20, 23, 25, A9
44 U.S.C. 380 9, 23, 25, A9

FEDERAL RULES OF CIVIL PROCEDURE—

Rule 12 (b), (h) 9, 11, 12, 13, 14, 15, 16, 17, 36, A10
Rule 56 (b), (e 15, 36, A11

MISCELLANEOUS—

54 Am. Jur., p. 628 26
1A Barron and Holtzoff, Sec. 370, p. 513 ..... 14, 15
1A Barron and Holtzoff, p. 529 15
21 C.J., p. 1188 26
48 C.J., p. 767 34
35A C.J.S., p. 725 12
35A C.J.S., pp. 767-769 19
Cyclopedia of Federal Procedure, Sec. 4.14, 28 U.S.C.A. 1406 11
1 Moore's Federal Practice, p. 649 14
2 Moore's Federal Practice, 2nd Ed., 1948, pp. 2219, 2220, 2260 17
1946 U.S.C., Congressional Service, 79th Congress, 2nd Session 21
1957 U.S.C., Cong. and Adm. News, p. 1674 22

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

John N. Thompson, your petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this cause on December 29, 1962.

OPINION BELOW

The Federal District Court for District of Kansas did not render a formal opinion. The opinion of the Court

of Appeals has not yet been reported. A copy is appended as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1962, and the judgment of the District Court was filed November 7, 1961. The jurisdiction of this court is invoked under the provisions of 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in view of Civil Rule 12, it is necessary for defendant to plead specially or file a motion to dismiss in order to attack the District Court's jurisdiction involving improper venue before filing his answer which sets up such defense therein.

2. Whether a non-resident who denies venue in his answer filed before filing a motion for summary judgment under Civil Rule 56 containing affidavits claiming non-residence which motion was overruled, can be presumed to have waived his right of improper venue defense.

3. Whether it is mandatory that the district court of a district, in which is filed a case laying venue in the wrong district, either dismiss or transfer such case to a district in which it could have been brought, if timely notice of objection to venue was given by defendant.

4. Whether the Circuit Court of Appeals should have remanded the case on its own motion, when it learned that suit was instigated in the wrong district and defendant objected thereto in his answer and arguments.

5. Whether a non-resident who denies venue in his answer can be presumed to have waived that right by further pleading in filing a counterclaim therein.

6. Whether the District Court erred in dismissing defendant's counterclaim in view of the provisions of Civil Rule 12 (b) and 12 (h), and whether the Court of Appeals erred in sustaining such dismissal.

7. Whether the United States can recover an overpayment due to its own mistakes from a payee who, in reliance upon said payments, has changed his position and cannot be put *in statu quo*.

8. Where there is no specific statutory provision authorizing the United States Government to institute court proceedings against the petitioner herein for the recovery of money allegedly owed to the United States Government, can the United States Government after waiting ten years or longer, institute proceedings against the petitioner to enforce the purported claim.

9. Assuming no statutory authority exists as stated above and the United States Government apparently has invoked an equitable doctrine to enforce its purported claim against the petitioner, does the United States Government reduce itself to the status of a private litigant which makes it amenable to any and all legal and equitable defenses, including the statute of limitations, laches and equitable estoppel.

10. Whether the statutory provisions of 31 U.S.C. 122 prohibits the United States Government from instituting court proceedings to recover money from the petitioner after the expiration of more than ten years from the last date of the alleged overpayment.

11. Whether the statutory provisions of 31 U.S.C. 129 prohibit the United States Government from instituting

court proceedings to recover money from the petitioner after the expiration of more than ten years from the last date of the alleged overpayment, which checks obviously contained the forged signatures of Maud O. Thompson.

12. Whether the records produced by the United States Government, more specifically described as records of the office of the Records Management and Services Branch, United States General Accounting Office containing data to the extent that government checks in question were negotiated and paid by the treasurer of the United States in due course to one Maud O. Thompson of which have not been previously questioned and that no allegation of non-receipt of the described checks had been received by said office and the compilation of the checks in question bearing the check and symbol numbers, the month and year and the amount naming Maud O. Thompson as payee, whether such records sufficiently and clearly establish that the Maud O. Thompson to whom the checks were sent was the mother of the petitioner; and if so, does the evidence or record show that she did in fact at any time endorse and negotiate any of these checks.

13. Whether the United States Government was legally permitted to rely upon the compilation of the records furnished by the General Accounting Office as above mentioned to establish their claim against the petitioner herein and was permitted to destroy the cancelled checks and other related documents in view of the provisions set forth in 44 U.S.C. 374 prohibiting records pertaining to claims and demands by the United States Government from being disposed of until such claims, demands and accounts had been settled and adjusted by the General Accounting Office.

14. Whether when a district court jurist, who has had a particular case under his supervision from the very

beginning of the suit through the actual trial in a tremendously overcrowded docket, has been promoted to a circuit court judgeship and finds it necessary to clear up his overcrowded district docket while at the same time assuming his new duties, if such a situation could create the possibility of an unfair and biased adjudication on this matter due to insufficient time and haste caused by the overcrowded docket and backlog of cases, and the genuine and sincere interest and desire of the jurist to begin his new assignment as soon as possible.

STATUTES AND RULES INVOLVED

The statutes and rules involved are set out in Appendix B, *infra*.

STATEMENT OF THE CASE

The United States brings this suit in a sovereign capacity under the authority and at the direction of the Attorney General of the United States against the petitioner in the United States District Court for the district of Kansas.

It attempts to obtain from petitioner $3,100.00 which they alleged was paid to his mother, Maud O. Thompson, pursuant to a Class E allotment beginning in November, 1946, and ending in May, 1949. The allotment was apparently authorized by petitioner in October, 1946. No deductions were made from petitioner's pay during that period of time. No payments were received during that period of time by petitioner's mother, Maud O. Thompson. Payments were made to a Maud O. Thompson in the amount of $3,100.00 and apparently were endorsed and negotiated by persons unknown signing the name Maud O. Thompson.

obviously a forgery. These negotiated checks were destroyed by respondent, and therefore it is impossible to verify whether the signature Maud O. Thompson was genuine or a forgery. An audit of the account of the petitioner was made at the request of respondent in 1959, ten years after the last check was negotiated and thirteen years after the first check was negotiated.

Suit was filed August 4, 1959, without prior notice to the petitioner. On August 28, 1959, petitioner was served with summons at Kansas City, Kansas, by the United States Marshal for the district of Kansas after he called petitioner in Kansas City, Missouri, and asked petitioner to meet him at 1903 North Allis, Kansas City, Kansas. Petitioner agreed to accept service in Kansas although he informed the United States Marshal that he was a resident of Missouri and not Kansas. Petitioner filed his answer denying that he was indebted to plaintiff in any amount and denying that he was a citizen of Kansas and also denying that his mother, Maud O. Thompson, was paid the amount claimed. Respondent thereupon filed its Motion for Summary Judgment and your petitioner filed a resistance thereto with affidavits showing his mother receiving no money from the United States Government and petitioner not being a resident of Kansas. Petitioner then filed a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure stating that plaintiff had failed to state a claim upon which relief could be granted in that no allegation was made by plaintiff that Maud O. Thompson received any of the allotment checks from plaintiff and also stating in the accompanying affidavits that petitioner was not a resident of Kansas. Both Motions for Summary Judgments were dismissed by the court whereupon petitioner filed an amended answer by adding additional defenses therein including his complaint beyond the time limit set for filing such

complaints and that it was dilatory in filing the complaint and that vital and necessary records in the case had been deliberately destroyed by plaintiff and that plaintiff failed to state a claim upon which relief could be granted.

Petitioner filed a counterclaim which was dismissed by the District Court and upheld by the Court of Appeals on the grounds that if the petitioner, as a discharged civil servant and a veteran, has any justifiable rights under any of the statutes which he argued in his brief, he must pursue them in an independent action and conform to the procedures set out therein; in other words the counterclaim was dismissed for want of jurisdiction.

In the pre-trial conference the plaintiff presented documentary evidence only, which consisted of a certificate of indebtedness from the United States Accounting Office and a compilation of government checks payable to Maud O. Thompson and petitioner's allotment pay record. The petitioner requested plaintiff to produce the cancelled checks, allegedly endorsed by Maud O. Thompson, but it informed the court that such checks had been destroyed at least three years before by the United States and therefore were not available. The court told respondent that it was not enough to prove their case with records showing it had mailed the checks to petitioner's mother, but it would be necessary to prove Maud O. Thompson actually received such checks. A deposition was taken of Maud O. Thompson by respondent in which she emphatically stated that she had received *no* money from the United States Government during that time. The case was brought to trial; no additional evidence was presented by respondent. The court, after many months, made findings of facts and conclusions of law and rendered judgment thereon in favor of the plaintiff. The judgment, on appeal by petitioner to the Tenth Circuit Court of Appeals, was affirmed.

It should be brought to the court's attention, however, that after the completion of the evidence and testimony and before judgment was rendered, the Honorable Judge Delmas Hill was promoted to the Circuit Court of Appeals and had a backlog of cases in the District Court of which it was necessary for him to close out immediately. Consequently, it is possible and the petitioner so contends, that a complete unbiased adjudication of this matter was not made by the Honorable Judge Hill, as evidenced by the judgment rendered by him which was wholly opposite of the opinions expressed by him during pre-trial conference.

REASONS FOR GRANTING CERTIORARI

1. The court below has decided five important questions of federal law which have not been, but should be, settled by this court. These five points are reflected in Questions Presented, Numbers 3, 5, 10, 11, 13 and 14.

A. Held by court below that filing of a counterclaim joined in the same answer along with the defense of improper venue waives the defense of venue. The Supreme Court has not decided this question since Civil Rule 12(b) was adopted.

B. Court below held that 31 U.S.C. 129 and 31 U.S.C. 122 are not applicable in this case as a limitation against the United States. This has not been decided by the Supreme Court.

C. A novel situation has arisen in this case in that the District Court trial judge in this matter has been promoted to a Circuit judgeship. This appointment came after the trial and at a time the district docket was overcrowded and a shortage of jurists existed in the district. It is believed that the long delay from the end of trial to the judgment entry date was created by the backlog of cases on the docket. Enter-

taining a genuine, sincere desire to begin his new assignment, coupled with the tremendous backlog of cases that only he could clear up unintentionally prevented the jurist from rendering a fair and unbiased opinion to the prejudice of petitioner. For these reasons and in the interest of justice, this court should review the evidence and pleadings presented.

D. The court below has rendered a decision in direct contradiction of Rule 12(b) of the Federal Rules of Civil Procedure and this court should resolve this procedural federal question, since it is one of vital importance.

E. Another unique situation arises when vital records necessary for defense of petitioner were destroyed by respondent in violation of Title 44, U.S.C. 374 and 380. This destruction of vital records has not been decided by this court but should be decided as an important question of federal law.

2. The decision below is in conflict with other Courts of Appeal on three points reflected in Questions Presented, Numbers 1, 2, 8 and 9.

A. The court below held that a motion to dismiss charging improper venue must be filed before an answer in order to attack jurisdiction. This is in direct conflict with the decision of the Seventh Court of Appeals as represented in *Shall* v. *Henry*, 211 F.2d 226.

B. The court below held that a motion for summary judgment waives all objections thereafter to venue. This is contrary to decisions of the Fourth Circuit as expressed in *Prudential Insurance Co.* v. *McKee*, 81 F.2d 508, and the Second Circuit in *Untersinger* v. *United States*, 172 F.2d 298.

C. The court below held that the United States is not amenable to the doctrine of laches as to its governmental function when it invokes aid of court as a litigant. This is in contradiction to decisions in the

Second Circuit represented by *United States* v. *Johnston*, 124 U.S. 236; the Fifth Circuit *United States* v. *Maryland Casualty*, 235 F.2d 50; *Jones* v. *Watts*, 142 F.2d 575, cert. denied 323 U.S. 787; *Walker* v. *United States*, 139 Fed. 409, aff. 148 Fed. 1022; Seventh Circuit *United States* v. *Stinson*, 125 Fed. 907; Eighth Circuit *In re Minot*, 298 Fed. 853 and *Iowa* v. *Carr*, 191 Fed. 257.

ARGUMENT

I. Petitioner Did Not Waive His Right to Be Tried in the District of His Residence.

The petitioner contends that the United States brought this action in the wrong district because petitioner, at the time suit was brought, and at the present time, was a citizen of Missouri and not Kansas, where the suit was brought. 28 U.S.C. 1391. The Tenth Circuit Court of Appeals admitted that "The proper venue at the time the action was brought was in the state of Missouri." Consequently, since suit was brought in the wrong district by the United States government, then, according to 28 U.S. C.A. 1406(a) the suit should have been dismissed or transferred to the proper district, the Western District of Missouri, unless the defendant positively waived venue. *Skilling* v. *Funk Aircraft*, (1959 D.C. Mo.) 173 F. Supp. 939; *Pinesich* v. *Miller*, (D.C. Pa. 1950) 89 F. Supp. 539; *International Refugee Organization* v. *Bank of America*, (D.C. N.Y. 1949) 86 F. Supp. 884; *Stamation* v. *Miller*, (D.C. Pa. 1949) 88 F. Supp. 556; *Orr* v. *United States*, (C.A. N.Y. 1949) 174 F.2d 577; *Riley* v. *Union Pac. R. Co.*, (C.A. Ill. 1949) 177 F.2d 673; *Wilt* v. *Smack*, (D.C. Pa. 1957) 147 F. Supp. 700; *C-O-Two Fine Equip. Co.* v. *Barnes*, (C.A. 7, 1952) 194 F.2d 410 cert. den. 72 S. Ct. 763, 343 U.S. 925; *Hayes* v. *Livermont*, (C.A. D.C. 1960) 279 F.2d

818; *Brotherhood of Locomotive Firemen and Enginemen v. Graham*, (C.A. D.C. 1948) 175 F.2d 802.

In a recent case, *Rensing* v. *Turner*, 166 F. Supp. 790 (1958), the Court held in continuing the same interpretation as stated above:

> "A district court may have jurisdiction over the subject matter and may obtain personal jurisdiction over the defendant by service of process and yet the defendant may defeat the suit in that district by asserting his privilege of venue, if venue is not proper in the district. Cyclopedia of Federal Procedure, Sec. 4.14. Title 28, U.S.C.A. 1406;" *Robertson* v. *Railroad Labor Bd.*, 268 U.S. 619, 623, 69 L. Ed. 1119.

The Appeals Court further states, however, that the petitioner waived his objection to improper venue by filing his "motion for summary judgment as such or as a motion to dismiss" which the Court says voluntarily invoked the judgment of the Court for a complete disposition of the case. The Appeals Court implied that because no specific motion challenging the venue question was filed by the petitioner, he did not object to venue. We quote the concluding statement of the opinion: "The trial court found and we agree that no proper objection was made to venue and the motion for summary judgment was a waiver of any objection thereafter."

The petitioner believes that the Appeals Court erred in this deduction and its decision is directly contrary to Civil Rule 12 (b) of the Federal Rules of Civil Procedure which is herein set out, Appendix page A10.

The record shows that petitioner objected to venue in his answer, in accordance with Civil Rule 12 (b). The record further shows that he objected to venue in his motion for summary judgment in the affidavits attached thereto. It is true that petitioner did not file a motion to dis-

miss especially because of improper venue, but neither was he so required. Under Civil Rule 12 (b), a defendant has the option to assert improper venue by motion or by answer. *Saunders* v. *United States*, (D.C. N.H. 1945) 59 F. Supp. 689; *Blackmar* v. *Guerre*, 1952, 342 U.S. 512, 96 L. Ed. 534; *Fairhope Fabric* v. *Mohawk*, (1956, D.C. Mass.) 140 F. Supp. 313; *Duval* v. *Bathrick*, (1940, D.C. Minn.) 31 F. Supp. 510; *Heiss* v. *Nielsen*, (1955, D.C. Neb.) 132 F. Supp. 541; *Kaufman* v. *United States*, (1940, D.C. D.C.) 35 F. Supp. 900.

The petitioner complied with Rule 12 (b) of the Federal Rules of Civil Procedure by stating in Paragraph 2 of his Answer that he was not a citizen of the state of Kansas. Therefore, petitioner was timely in asserting his venue privilege. *Schnell* v. *Eckrich*, 365 U.S. 260, 5 L. Ed. 2d 546, p. 1063 (1961). In *Prudential Ins. Co.* v. *McKee*, 81 F.2d 508, the Court stated that if an objection to venue has been made seasonably, it is not waived. *Cohen* v. *Beneficial Industrial Loan Corp.*, 93 F. Supp. 418; 35A C.J.S., p. 725.

In the *Untersinger* v. *United States* case from the Second Circuit Court of Appeals decided in 1949, 172 F.2d 298, the court held that any willingness to accept jurisdiction and improper venue is of no value until an answer has been filed therein containing no improper venue defense. In a lengthy discussion the court outlined the old common law rule stated in Chitty on Pleadings, 16th Am. Ed., Vol. 1 pp. 443-4, which states that by pleading to the merits, a defendant came before the court and could not thereafter say he was not in court. Judge Swan went on to say that the adoption of the Federal Rules of Civil Procedure caused this common law rule to cease to exist in civil actions. "Under Rule 12 (b)," the court continues, "the joining of objections to venue with a plea to the

merits does not constitute a waiver of improper venue. Orange Theatre Corporation v. Rayherstz Amusement Corporation, 3 Cir., 139 F.2d 871, 874; Blank v. Bitker, 7 Cir., 135 F.2d 962, 966."

In other words, if a defendant indicates a willingness to defend, despite the bringing of the suit in the wrong district, such willingness cannot be detefmined until after the answer has been filed. If there is an objection to venue in the answer, there is definitely an unwillingness to submit to improper venue and it is impossible to have a waiver thereto. Judge Follmer held in *Walsh* v. *United States*, 81 F. Supp. 667, that there was no waiver where an objection to venue had been made in the answer which also pleaded to the merits.

Under Rule 12 (b) of the Federal Rules of Civil Procedure, a party may raise the defenses numbefed (1 to 5) in the rule, among them the defense of improper venue, and losing thereon proceed to litigate on the merits, and losing on the merits appeal and attack the judgment both on the merits and on such grounds (1 to 5) as he has urged. *Speir* v. *Robert C. Herd & Co.*, (1960, D.C. Md.) 189 F. Supp. 436; *Lisle Mills, Inc.*, v. *Arkay Infants Wear, Inc.*, (1950, D.C. N.Y.) 90 F. Supp. 676; *Dow Chemical Co.* v. *Melton Corp.*, (1960, C.A., N.C.) 281 F.2d 292.

In the case at hand, your petitioner filed his answer containing his objection to venue *before* his motion for summary judgment had been filed. The Appeals Court held that since the motion for summary judgment had been overruled, your petitioner could not object to improper venue thereafter. This is directly in conflict with and opposite to the rules of civil procedure as specified in Civil Rule 12 (b) which provides for objection to improper venue in the answer without waiver. *Frye* v. *Batavia*, (D.C. D.C. 1943) 8 F.R.D. 334; *Mizrahi* v. *Pandora Frocks*,

(D.C. N.Y. 1949) 86 F. Supp. 958; *Bowles* v. *Underwood Corp.*, (D.C. Wisc. 1945) 5 F.R.D. 25.

In *Frye* v. *Batavia V. A. Employees Federal Credit Union*, *supra*, the court said: "Special appearances are no longer necessary in any case. A party who proceeds in accordance with Rule 12 can raise any and all defenses without waiver. 1 Moore's Federal Practice 649. If the defendant so desires he may present every defense or objection that he has in his answer without waiving any rights. Thus objections that the court has not secured jurisdiction over the defendant, or that the venue is improper, defenses which quote commonly have to be made by special appearance, may be pleaded in the answer together with such other defenses as a failure on the part of the plaintiff to state a cause of action. . . . The defendant waives nothing by so doing."

Under Civil Rule 12 "no motion is necessary to assert any defense or objection to any claim for relief in any pleading. Under subdivision (b) of the rule, all defenses and all objections, whether to a claim, counterclaim, cross-claim or third-party claim, may be asserted in the responsive pleading." 1A Barron & Holtzoff, Sec. 370, p. 513.

In *Shall* v. *Henry*, (C.A. 7 Ill., 1954) 211 F.2d 226, the court stated that the practice as to waiver of right to be sued in proper federal district was changed by Rule 12 (b), so that defenses to merits may now be set up in the same pleading including defenses of court's lack of jurisdiction of person and wrong venue without waiving such defenses, and special appearances to challenge such jurisdiction or venue are no longer necessary.

An answer incorporating numerous objections and defenses waives nothing except what is omitted therefrom. Stated in another way, the allegations or denials of the

answer with respect to the merits, do not, in the slightest degree, impair or waive objections to the venue, jurisdiction of the person, defects of process, or other objections or defenses set up in the same answer. *Young* v. *Aetna Life Ins. Co.*, (D.C. Pa. 1940) 32 F. Supp. 389, affirmed 113 F.2d 601; *Denier* v. *George Cole Motor Co.*, (D.C. Va. 1939) 27 F. Supp. 978; *Beneficial Industrial Loan Corp.* v. *Kline*, (D.C. Ia. 1941) 41 F. Supp. 854; *Schlaefer* v. *Schlaefer*, (1940) 112 F.2d 177, 71 App. D.C. 350, A.L.R. 1014; *Gaines* v. *Gaines*, (C.A. 1946) 157 F.2d 521, 81 U.S. App. D.C. 260. An answer waives any defense or objection not so included, except those specified in Rule 12 (h). And the defendant cannot be required to elect as between two or more defenses. 1A Barron & Holtzoff, Sec. 370, pp. 517-519; *Fidelity & Deposit Co. of Md.* v. *Krout*, (C.C.A. 2d 1945) 146 F.2d 531; *Lyon* v. *G.M. Corp.*, (D.C. Ill. 1961) 201 F. Supp. 89.

It should be remembered that petitioner's motion for summary judgment was based on Civil Rule 56 and not Civil Rule 12. In fact, the motion so states. A motion for summary judgment based under Rule 56 cannot be a motion under Rule 12 and therefore such motion cannot fall within the waiver provisions of Rule 12 (h). 1A Barron & Holtzhoff, Sec. 370, p. 529. Therefore, when petitioner filed his answer before the denial of his motion for summary judgment, he was employing the availability of Rule 12 for the first time, and the provisions of Rule 12 were activated at that time and continued thereafter.

Where defendant's original answer specifically objected to venue and the oral arguments and briefs on the motion to dismiss were also directed to the same question, it was held in *Prudencio* v. *Henselmann*, (1959, D.C. Minn.), 178 F. Supp. 887 (an alien's action for personal injuries), that defendant's right to object to improper

venue was not waived merely because his written notice of motion did not mention venue and referred only to the court's lack of jurisdiction over the subject matter and the person of the defendant.

Although the defendant, after seasonably asserting improper venue by motion to quash summons, served and filed an answer and at the same time, but separately, served a motion for summary judgment in his behalf, and in none of these motions asserted improper venue as a ground of the motion, and although both these motions were served and filed after he had participated in the taking of the depositions of sundry witnesses, one in his own behalf, it was held in *Heiss* v. *Neilsen*, (1955, D.C. Neb.) 132 F. Supp. 541, that he had not waived his venue objections. Recognizing that prior to September 16, 1938, when the Federal Rules of Civil Procedure became effective, defendant's answer upon the merits would have been regarded as a waiver of the venue objection, the court pointed out that Rule 12 (b), by providing that "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion," did away with the traditional necessity of strict limitation to a special appearance by a party who desired to challenge venue or jurisdiction over his person, and allowed him to make that challenge either by separate motion or in the same pleading which answered on the merits.

The Court of Appeals gives as an additional reason for the waiver of any objection to venue by the petitioner the fact that he filed a counterclaim. Had this action been filed prior to the adoption of the Federal Rules of Civil Procedure, such a pleading might have constituted a waiver of the venue defense. The petitioner contends that Rule 12 (b) changed the previously prevailing law so that

any and all defenses, including counterclaims, may be joined in the answer along with the defense of improper venue. The Supreme Court of the United States has never decided this question to our knowledge, and the few decisions of the lower federal courts are not in agreement.

In *Keil Lock Co.* v. *Earle Hardware* (D.C. N.Y., 1954), 16 F.R.D. 388, defendant had raised objections to jurisdiction over his person, objections which plaintiff conceded to be well founded. But defendant had also asserted a counterclaim. Plaintiff contended that this assertion of a counterclaim waived the jurisdictional objection. It is clear that plaintiff's position would have been sound prior to the adoption of the rules. But the district court in this case rejected plaintiff's contention that the improper venue objections had been waived. We quote its interpretation of Rule 12 (b), "Every defense available to a party, including a counterclaim, shall be asserted in a responsive pleading and that no defense or objection is waived by being joined with another." 2 Moore, Federal Practice, 2d Ed. 1948, at pp. 2219, 2220 and 2260; *Sadler* v. *Pennsylvania Ref. Co.*, (1940, D.C. S.C.), 33 F. Supp. 414.

The Court of Appeals has declared that improper venue is a defense personal to the defendant and may be waived. This we acknowledge. However, if a party wishes to take advantage of this privilege, he must do so according to the Civil Rules of Federal Procedure as expressed in Rule 12 (b). This is exactly what your petitioner did. He objected to venue in his answer which was the *first* responsive pleading. In addition, he verbally objected to service of process at the time of service because of improper venue and at no time during the entire proceedings from the service of process to the present time did he show through his conduct any intention of waiving venue. Of course he defended himself in this action to the

best of his ability as any ordinary person would do, but he never did relinquish his right to be tried in the district of which he was, and is, an inhabitant. To the contrary, at every opportunity and in every pleading and in all his briefs, petitioner reiterated time and again that he was not a citizen of Kansas but that he was a citizen of Missouri and should be tried there. It is also interesting to observe that at no time prior to the appeal made by your petitioner to the Tenth Circuit Court of Appeals did the United States contend that your petitioner had waived his venue privilege.

II. The Court Erred in Overruling Petitioner's Motion for Summary Judgment.

Petitioner's Motion for Summary Judgment was predicated upon at least two (2) grounds: one, that the complaint did not allege that Maud O. Thompson ever received any of the allotment checks from complainant; two, there was no demand made upon petitioner and that there was no refusal by petitioner. The motion was supported by two (2) affidavits, to-wit: One executed by Maud O. Thompson and one by John N. Thompson, the petitioner. The contents of these affidavits were not controverted by counter affidavits nor by any other evidence. The only evidence the government offered to establish the receipt of the checks in question by Maud O. Thompson was plaintiff's Exhibit Three showing the checks were negotiated to Maud O. Thompson. It is by this method that the government attempts to show that Maud O. Thompson in fact received the checks in question. The fallacy of this method is that the cancelled checks were not available to show conclusively that Maud O. Thompson did in fact receive the checks because the records were destroyed eight years after date of issue of all paid checks. The best evidence would have been the cancelled checks; but by reason

of their destruction by respondent, the only basis upon which the government tends to show receipt is that the check or checks were negotiated in due course. This type of evidence is subject to speculation and conjecture. Maud O. Thompson's deposition coupled with her affidavit denies ever receiving any payment of allotment checks. Thus we feel that the government wholly failed in establishing actual receipt of the checks in question.

The petitioner denied that a demand for payment was ever made upon him. It was incumbent upon the government to show that a demand and refusal was in fact made to permit recovery.

In his Motion for Summary Judgment, petitioner stated that he was not a resident of Kansas, and also in the affidavit of Maud O. Thompson, attached to the said Motion for Summary Judgment, in which she stated that: "Of my own personal knowledge, John N. Thompson is not now and was not during August, 1959, a citizen of the state of Kansas." The United States District Court failed, neglected and refused to take notice of the wrong venue then and there existing. The Motion for Summary Judgment should have been sustained on these grounds alone. The only alternative the court could take would be to have the case transferred to the proper district. Since the court failed to transfer the case under Sec. 1406 (a), U.S.C., it erred in overruling petitioner's Motion for Summary Judgment. 35A C.J.S., Sec. 515, pp. 767-769; *Stamation* v. *Miller* (D.C. Pa.), 88 F. Supp. 556; *Jones* v. *Radio Corporation of America* (D.C. N.Y.), 129 F. Supp. 440; *Skilling* v. *Funk Aircraft* (D.C. Mo.), 173 F. Supp. 939; *Schiller* v. *Mit-Clip Co.* (C.A. N.Y.), 180 F.2d 654; *Rensing* v. *Turner* (D.C. Ill.), 166 F. Supp. 790; *Amerio Contact* v. *Knowles*, 274 F.2d 590 (C.A. D.C.).

III. No Right of Action Exists in Favor of the United States Against Petitioner; but Assuming Such Right Does Exist, It Is Barred under 31 U.S.C. 129, 31 U.S.C. 122 and 44 U.S.C. 374.

It is the contention of the petitioner that there is no statutory authority for the United States to institute an action of this type against your petitioner. The action, if it could be justified at all, should have been brought against the person to whom they alleged the money was paid, Maud O. Thompson, who was the only one who could have benefited thereby.

However, assuming, but not conceding, that a right of action did exist in favor of the United States against the petitioner, it is barred under 31 U.S.C. 129.

The action filed herein purports to enforce payment arising out of the liability of an endorser or checks bearing unauthorized or forced signatures although the payee and alleged endorser, Maud O. Thompson, is not made a part of this litigation.

31 U.S.C. 129 in substance precludes an action from being brought by the government or any agent or official thereof unless the action is commenced within six (6) years after the presentation to the Treasurer of the United States or other drawee of such issued checks or unless within that period written notice which has been given by the United States or an agency thereof to such endorser or financial agent of a claim on account of such liability. An additional period of one hundred and eighty days is granted to the government if such claim is presented to the General Accounting Office or the Treasurer of the United States within the time limitation prescribed by Section 122 of this title.

The record in this case discloses that the action was filed August 4, 1959. The last check that was negotiated was issued in May of 1949. The first check was issued in November, 1946, seventeen years ago. The Certificate of Indebtedness, marked plaintiff's Exhibit Two, which reflects that the General Accounting Office had examined and settled a claim against the petitioner, is dated April 3, 1959. Presumedly the Certificate of Indebtedness and the contents thereof purports to show that the claim against the petitioner was presented to the General Accounting Office in 1959. Unfortunately, it was not presented within the one hundred and eighty (180) days within the period of six (6) years from the issuance of the check or checks in question. None of the requirements were complied with to remove the bar against the United States in this action.

The legislative history (U.S.C., Congressional Service, 79 Congress, 2nd Session, 1946) very clearly manifests the intent and meaning of the act.

> "Government check and warrants claim H. R. No. 101 February 12, 1946. The general purpose of this legislation is to provide relief for banks, merchants and others handling government checks by limiting the time within which the government may bring action to recover the proceeds of such checks by reason of a forged endorsement or unauthorized signature. . ." States further, "By virtue of the endorsements on the checks and warrants guaranteeing or warranting the genuineness of prior endorsements, *the endorsers, banks and others, are confronted with the possibility of being called upon many years thereafter to refund the amounts of checks and warrants belatedly found to bear forged or unauthorized endorsements.*
>
> "*Present Legislation bars the United States from enforcing any claim arising out of the forged or unauthorized signatures unless the United States or any agency thereof has given written notice of such claim or*

commenced the proceedings within six years from the presentation of the checks or warrants to United States Treasurer."

Further stated on p. 1677, 3 (b) . . . .

"This limitation is extended by an additional one hundred eighty (180) days in connection with *any* claim presented to the General Accounting Office within the six (6) year time limitation prescribed by the Act of June 22, 1926, referred to above in paragraph 3 (a)."

In order to appreciate the full context and the meaning and intent of the above Congressional Act, it is necessary that we direct your attention to 31 U.S.C. 122, which reads as follows;

"Hereafter all claims on account of any check, checks, warrant, or warrants appearing from the records of the General Accounting Office or the Treasury Department to have been paid, shall be barred if not presented to the General Accounting Office of the Treasurer of the United States within six years after the date of issuance of the check, checks, warrant, or warrants involved . . . As amended August 28, 1957."

The legislative history is necessary that the meaning and intent be clarified as to its application, 1957 U.S.C. Cong. and Adm. News, p. 1674.

"3 (a) *Claims on account of checks appearing to have been paid.* Under the act of June 22, 1926 (44 Stat. & 61:31 U.S.C. 122), a claim on account of check appearing to have been paid is barred if not presented to the General Accounting Office within six (6) years after the date the check was issued. The reference in this connection to the General Accounting Office was in recognition of the fact that formerly the General Accounting Office had custody of all paid checks and maintained the records with

regard to paid checks. Under current procedure, however, the office of the Treasurer of the United States maintained custody of paid checks, and related records. Accordingly, Sec. 3 (a) of the bill would provide an amendment to present law under which a claim on account of a check appearing to have been paid would be barred if not presented to the General Accounting Office or the Office of the Treasurer of the United States within six (6) years after the date the check was issued." (Exception with respect to checks from the Phillipines.)

The last check issued was in May, 1949, the first in 1946.

The petitioner was discharged from the military service on May 24, 1949, giving the government every benefit to which it is entitled and even by the stretch of one's imagination, we cannot find any justification for the long unreasonable delay in asserting its claim against the petitioner--approximately ten (10) years from the date of petitioner's discharge and approximately ten (10) years from the date of the issuance of the last check, seventeen years ago when the first check was sent.

According to Title 44, Chapter 10, entitled Disposition of Records and specifically including Sections 374 and 380, no records of the United States Government shall be destroyed except in accordance with the provisions of this chapter.

In *Mitchell* v. *Birkett*, (D.C. Ark. 1960) 183 F. Supp. 291, the United States government sought to recover from employers wages allegedly due employees but the court held that the United States government, through its Secretary of Labor, was barred by the statute of limitations to recover these wages.

In *United States* v. *Winegar*, (C.A. Utah 1958) 254 F.2d 693, the court held that the United States government could come in and sue for liquidated damages for unpaid overtime wages any time before the period of limitations had run. Conversely speaking, the government could not come in after the statute of limitations had run.

The United States government deliberately and contrary to the laws of the United States, as stated above, destroyed the most important papers in this case which were the checks the United States government claimed were sent to Maud O. Thompson. These checks, bearing the alleged signature of Maud O. Thompson, represent the only evidence besides the affidavit and deposition of Maud O. Thompson, now deceased, that can prove whether such alleged signatures were the actual signatures of Maud O. Thompson or a forgery. Had the regular procedures provided for in the above statute been complied with by respondent, these checks would be here today so there would be no doubt about the fact that the signatures were a forgery. The United States government, by their own illegal act, has therefore prevented petitioner from presenting a defense to this action they have brought against him. Please note that this section states that no records pertaining to claims and demands by the government of the United States or against it or to any accounts in which the government of the United States is concerned, either as debtor or creditor, shall be disposed of by the head of any agency under any authorization until such claims, demands and accounts have been settled and adjusted in the General Accounting Office. According to the statement of respondent, these checks were destroyed in 1957, and there has been no proof offered by the United States to show that this account had been adjusted in the General Accounting Office prior thereto. However, there is evi-

dence produced to show that this account was presented to the General Accounting Office in 1959, two years after the checks were destroyed. Therefore, the United States government in this case has destroyed all records relevant to defense by your petitioner herein and then ten years after the accrual of the alleged claim, they attempt to collect from him. The petitioner does not believe that the court will sustain such wrongful, illegal and designed malicious actions of the United States government to be perpetrated against one of its citizens.

Not only does this case fall squarely within the purview of 31 U.S.C. 122 and 129 and 44 U.S. 374 and 380, but the doctrine of laches is applicable to this case. We recognize the general rule that the statute of limitations does not run against a sovereign government unless by legislative act a statutory period is prescribed for a sovereign to bring an action. The courts have generally held that the application of a statute of limitation is to be strictly construed against the United States government. See *EPI Dupont DeNemours and Co.* v. *Davis,* 264 U.S. 456; *Phoenix Electronics* v. *United States,* 164 F. Supp. 614. This court had an opportunity to apply the two (2) years statute of limitations to the United States government in its attempt to enforce a claim under the Portal to Portal Act, 1949, involving a claim for liquidated damages in *United States* v. *W. H. Kistler Stationery Co.,* 200 F.2d 805 (C.A. Colo., 1953). See *United States* v. *Lovknit Mfg. Co.,* 189 F.2d 454, cer. den. 342 U.S. 915; *Lance* v. *United States,* 190 F.2d 204, cer. den. 342 U.S. 915.

A government which invoked aid of court as a litigant, stood as any other litigant, and laches, which ordinarily would be ineffectual in denying a claim by the government, would visit the same consequences upon the govern-

ment as it would on a citizen where the request to open the portal was through the appeal and power of equity. *United States* v. *Maryland Cas.*, 235 F.2d 50 (C.A. Fla. 1956) 5 Cir.; *Jones* v. *Watts*, 142 F.2d 575 (5 C.A. 1944), cer. denied 323 U.S. 787.

At this point we would like to emphasize that because of the long delay employed by the United States government in bringing this action, that your petitioner has been put at a distinct disadvantage in that vital records have been illegally destroyed by respondent and that all of these records and everything connected therewith were under the sole supervision of the United States government and were not available to petitioner. In *Point Landing* v. *Alabama Dry Dock*, (5 C.A., 1958) 261 F.2d 861, we quote from the opinion:

> "Laches is more than time. It is time plus prejudiced harm, and the harm is not merely that one loses what he otherwise would have kept, but that delay has subjected him to a disadvantage in asserting and establishing his claimed right or defense."

In *In re Minot Auto* (8 C.A. 1924) 298 Fed. 853, the court held that when the United States government enters a court of equity, it lays aside its power and becomes an ordinary litigant under the rules of equity.

One of the authorities that the complainant relied on in the Circuit Court of Appeals, American Jurisprudence, very specifically states that the United States government is barred from recovering overpayments because of laches. 54 Am. Jur., p. 628. The general rule that statutes of limitations do not run against the government has often been modified, and it has been frequently held that equity may prevent the operation of this rule by enforcing estoppel against the United States. 21 C.J., p. 1188; *Columbus*

v. *Union Pac. R.R.*, 137 Fed. 869; *Utah Power Co.* v. *U. S.*, 230 Fed. 328; *Bayne* v. *U. S.*, 195 Fed. 236; *Iowa* v. *Creighton*, 191 Fed. 270; *State* v. *Milk*, 11 Fed. 389; *Walker* v. *U. S.*, 139 Fed. 409 (Aff. 148 Fed. 1022 Mem.); *U. S.* v. *Stinson*, 125 Fed. 907 (Aff. 197 U.S. 200; *U. S.* v. *Fidelity Baltimore Bank*, (1959) 173 F. Supp. 565; *Badeau* v. *U. S.*, 130 U.S. 439; *U. S.* v. *Royer*, 268 U.S. 394. In the *Badeau* v. *United States* case, the court held that the United States could not recover back monies paid to Badeau by mistake. Badeau was an officer *de facto*, not *de jure*.

In *United States* v. *Bank of America*, 47 F. Supp. 279 (Calif. 1942), the court held "Laches is a valid defense as the delay appears to have prejudiced the defendant."

Walker v. *United States*, 139 Fed. 409 (C.A. Ala. 1905), is one of the leading cases in support of your petitioner's contentions. This is an action brought by Walker against the United States for fees due him while he was employed as a marshal. The United States interposed the plea of the statute of limitations of six years. Later the United States government counterclaimed for an amount Walker owed them which also would have been barred by the statute of limitations had the government not been a sovereign power. The court in its opinion thoroughly discussed this matter along with its history and decided that the claim of the United States was barred because of laches. We now quote:

> "The United States stands . . . upon no better footing than would the private citizen, though doubtless it may recover money paid under mistake of law by its officers . . . It is, however, equally true, when the sovereign becomes an actor in a court of justice, especially in an action which proceeds on equitable principles, that his rights must be determined upon those fixed principles of justice which govern between

man and man in like situation, and that the sovereign will be bound, as an individual would be, by his own actions, or by (what is the same thing) acts of his agents lawfully done within the purview of the authority he commits to them."

"The Supreme Court of the United States upholds the rights of its citizens against its own government, when it enters its courts against them, quite as far as the courts of England go in enforcing the rights of English subjects in suits against them by foreign princes. Indeed, it would seem it has gone a little further." (The court cites *The Davis*, 10 Wall. 17 and *The Siren*, 7 Wall. 159):

"The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the government (citing many cases). *Duval* v. *U. S.*, 25 Ct. Cl. 60; *Hartson* v. *U. S.*, 21 Ct. Cl. 456. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of their authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case, where he invokes judicial action. While the application of the doctrine is attended with difficulty under our institutions, where sovereignty of the United States does not reside in any one person or collection of persons, that difficulty is no reason for rejecting the operation of the principle, if the facts of the particular case will admit of its application."

This case cites *Badeau* v. *United States*, 130 U.S. 439 and *United States* v. *Johnston*, 124 U.S. 236, as authority. The court further states, "Here, owing to the statute of limitations, the government has avoided just claims of Walker which exceed the demand involved in the counterclaim. To allow the government under such circumstances to kill his claims with the bar of the statute, and then to take advantage of its sovereign character to recover money from Walker, who received and paid out the money in good faith, and who cannot protect himself by the statute of limitations, would be manifestly most unjust."

United States v. *Johnston*, (1888 N.Y. C.A.) 124 U.S. 236, is a case in which an account had been settled by the Treasury Department of the United States with the defendant. After such settlement, it was discovered that there was a balance due the United States by Johnston. Sev· al years later, as is the situation in the present case before the Court, the United States government brought suit against Johnston after the statute of limitations had run and the court held that the United States could not recover. The Honorable Justice Harlan delivered the opinion of the court and we quote his words: "We are of opinion that no case is made by the Government to invalidate the settlement of defendant's accounts. We concur with the referee when he says that 'it would be an exceedingly dangerous doctrine that settled accounts where the United States had acted on the settlement and paid the balance found due on the basis of that settlement, could be opened or set aside, merely because some of the prescribed steps in the accounting which it was the duty of a head of a department to see had been taken, had been in fact omitted; or, if they could be so opened and set aside on account of technical irregularities in the allowance of expenses years afterwards, when the remedy of the party

against the United States is barred by the statute of limitations, and the remedies of the United States on the other side are intact, owing to its not being subject to any act of limitation.'"

United States v. *Stinson*, (C.C.A. 7) 125 Fed. 907. This is a case in which the United States brought suit against the defendant and others on a claim that had accrued a great number of years prior to the institution of suit. The court held that the government had no case on the grounds that the doctrine of estoppel is applied to the United States government the same as to individuals. We quote from Circuit Judge Grosscup who states after discussing the statute of limitations in regard to the government. "But when the government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected. *Carr* v. *United States*, 98 U.S. 438, 25 L. Ed. 209. The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals. . . ."

Iowa v. *Carr*, (C.A. 8. 1911) 191 Fed. 257, is a suit in equity brought by Samuel Carr against Charles Hannan and the state of Iowa intervenes therein. The suit deals with boundary line between the state of Nebraska and the state of Iowa along the Missouri River. In this case, the state of Iowa had delayed many years before asserting their claim and the state claimed the general rule that neither by the statute of limitations, nor by laches, does mere delay bar the sovereignty from maintaining its rights or from sustaining a suit to enforce them. They also contend that every sovereignty is exempted from the rule of equitable estoppel:

"But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation, or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.

"The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances." (Citing many cases).

This case cites the *United States* v. *Walker* case as an authority along with several others and then states, the state of Iowa "never asserted or suggested (its claim) until more than twenty-six years thereafter, and one cannot wink so hard as not to see that it never would have asserted it if the hope of gain had not inspired Hannan, or some other speculator, to instigate and promote the demand. For more than twenty years the plaintiffs and their grantors were in undisturbed possession of this land, claiming title to it. Meanwhile they expended tens of thousands of dollars in its improvement, and the same quietly acquiesced in their possession and claim, and levied and collected from them taxes upon it as their property, and now by its silence, acquiescence, and taxation it is equitably estopped from taking from these plaintiffs this land and the costly improvements they and their grantors were thereby induced to make upon them. In *Smith* v. *Clay*, 3 Brown, Ch. 639, Lord Camden said: 'Nothing can call forth this court into activity but conscience, good faith and reason-

able diligence.' There is no equity in the claim of the state against the plaintiffs in this case, it does not appeal to the conscience, it is met by an equitable estoppel, it was not presented or prosecuted with reasonable diligence, and a court of equity may not sustain it."

The *United States* v. *Fidelity Baltimore Bank* case, (D.C. Md. 1959) 173 F. Supp. 565, is an action by the United States against a bank which had accepted checks on which the purported endorsements of payees had been forged and charged them to account of government agency. This 1959 decision discusses the principal rule that the United States is not bound by any statute of limitations, nor barred before laches of its officers, however gross, in a suit brought by it as a sovereign government to enforce a public right or to assert a public interest, but it also discusses exceptions to that rule. We quote from p. 567:

> "While mere delay, either by limitations or laches, does not of itself constitute a bar to suits of the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity, and prays its aid, its claims and rights are adjudicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances. Thus it was held that it is a good defense to an action by the government to set aside a patent for land on the ground of fraud that the title has passed to a bona fide purchaser for value, without notice. Equity will not simply consider the question whether the title has been fraudulently obtained, but will also protect the rights and interests of innocent parties. *United States* v. *Stinson*, (7 Cir.) 125 Fed. 907; *Id.*, 197 U.S. 200, 25 S. Ct. 426, 49 L. Ed. 724. See, also, *Walker* v. *United States*, C.C., 139 Fed. 409; *Id.*, (5 Cir.) 148 Fed. 1022; *State of Iowa* v. *Carr*, (8 Cir.) 191 Fed. 257, 266. *The Falcon*, 19 F.2d at p. 1014."

The decision in this case held that the general rule prevailed in this particular instance, instead of the exception. In other words; although the court held in this case that the general rule prevailed, it most certainly recognized the fact that there are exceptions to that rule and these exceptions do prevail in the proper situations and that laches and estoppel will be enforced against the United States. It is the contention of this petitioner that the present case does fall within the exception mentioned in *United States* v. *Fidelity Baltimore National Bank & Trust Company* case cited above.

Finally we quote from *United States* v. *Maryland Casualty*, (5 C.A. 1956) 235 F.2d 50:

> "The government is and ought to be treated as would be any other suitor, for '. . . when government seeks the aid of the court as a litigant it stands as any other litigant . . .', *Jones* v. *Watts*, 5 Cir., 142 F.2d 575, 577, 163 A.L.R. 240, cert denied 323 U.S. 787 . . . *In re Minot Auto Co.*, 8 Cir., 298 Fed. 853, 857 . . . (the door) could be opened only by the touch of the want of equity and not by the sheer weight or the loud peremptory knock of the sovereign's scepter. Laches would ordinarily be ineffectual in denying a claim by the government . . .. would therefore visit the same consequences upon the sovereign as it would a citizen where the request to open the portal is through the appeal and power of equity."

In view of the evidence contained in the record on appeal and the law applicable thereto and the foregoing authorities cited herein, the findings of facts and conclusion of law and the judgment predicated thereon in the district court and the opinion of the Court of Appeals were erroneous as the cause of action was barred by the statute of limitations, laches prevailed and an equitable estoppel was activated against the United States.

IV. The United States Cannot Recover Payments Made by Mistake to Petitioner When Such Recovery Was Attempted After Petitioner Had Irrevocably Changed His Position in Reliance Thereon and Which Would Also Be Barred by Statute of Limitations.

Although the general rule is that payments made by mistake are recoverable, there can be no recovery where the payee has received such payment in good faith and may in good conscience retain even though it was made under mistake of fact. 48 C.J., p. 761; *Shipman* v. *D. C.*, 119 U.S. 148, 30 L. Ed. 337; *Synthetic Patents Co.* v. *Sutherland*, 22 F.2d 494, 72 L. Ed. 741 (276 U.S. 630, cert. denied); *Texarkana Casket Co.* v. *Binswager*, 3 F.2d 611. Also payment of a debt barred by limitations cannot be recovered back on a plea of mistake of fact, *Hubbard* v. *Hickman*, (Ky.) 96 Am. Dec. 297.

It is a general rule that where the payee has changed his position to his prejudice in reliance upon the payment that he has received and cannot be placed *in statu quo*, the payment cannot be recovered even though it was made under a mistake of fact. 48 C.J., p. 767; *Espy* v. *Cincinnati First National Bank*, 21 L. Ed. 947; *Union Savings Association* v. *Kehlor*, 7 Mo. App. 158; *Union Trust Co.* v. *Gilpin*, 235 Pa. 524. Where the payee has irrevocably changed his position in reliance upon a payment made by the payor under a mistake of fact caused by payor on negligence or lack of diligence in taking advantage of means and knowledge available to him (the United States), there can be no recovery. The theory is this: "The party who has received the money must not, through the negligence or misconduct of the person who paid it, be placed in a worse condition than if the money had not been paid." *Girard Trust Co.* v. *Harrington*, 23 Pa. Super. 615, 620; *Hibbs* v. *Beall*, 41

App. 592 (D.C.); *Badeau* v. *U. S.*, 130 U.S. 439; *Walker* v. *U. S.*, 139 Fed. 409 (C.A. Ala. 1905).

In the case at hand, petitioner was the payee and the United States government was the payor. Through the negligence of the respondent and their own mistakes, the petitioner was paid the amount of money claimed as overpayments. This debt has been barred by the statute of limitations and cannot be recovered back because of the negligence and mistake of fact on the part of the United States government. The testimony as given by the petitioner showed that he had completely forgotten that he made a Class E allotment to his mother, Maud O. Thompson, and that he did not remember that such an allotment had been made until he was confronted by this law suit brought by the United States government, which was nearly thirteen years later. In the meantime, petitioner had received these payments in good faith and relied upon them in such a manner that it would be impossible to place him in a *status quo* position. It is common knowledge and the record bears this out that the petitioner irrevocably changed his position in reliance upon the payments made by respondent to him under a mistake of fact caused by their own negligence and lack of diligence in taking advantage of the means and knowledge available to it alone. It is a fact that the petitioner has been placed in a worse position than if the money had not been paid to him, because of the negligence and lack of diligence on the part of the United States government, who paid the money. The testimony shows that petitioner irrevocably changed his position in that he was working for a private organization and making a successful living; but in 1958, he changed his position and decided to go into the practice of law in the state of Missouri knowing full well that there would be a period of very little income during the change-

over. Had he known that he owed a debt to the United States government, he would not have made this change because of the financial liability that he would have to assume as a result thereof.

CONCLUSION

The ruling below certainly creates uncertainty and inconsistencies into the proper civil procedure, especially so far as the provisions of Rules 12 and 56 are concerned, which should be settled by this court. The novel situations presented in this case concerning a sovereignty should also be settled. For these reasons and the arguments presented, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1962.

JOHN N. THOMPSON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 6971.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

Charles S. Scott and J. Nelson Thompson (Elisha Scott, John J. Scott, and Samuel C. Jackson were with them on the brief), for Appellant.

Elmer Hoge, Assistant United States Attorney (Newell A. George, United States Attorney, was with him on the brief), for Appellee.

Before Lewis, Breitenstein and Seth, Circuit Judges.

SETH, Circuit Judge.

The United States brought this suit in the United States District Court for the District of Kansas in 1959 to recover $3,100.00 and interest from John N. Thompson, the appel-

lant. This amount was allegedly overpaid appellant by reason of the government's failure to make the proper deductions from his military pay during the time he had a Class E allotment in force. Appellant filed a counterclaim which was ordered dismissed by this court on appeal. A motion by appellant for summary judgment was denied, the case tried, and the trial court awarded the government $3,100.00 and Thompson has appealed.

It was not disputed that appellant authorized in 1946 a deduction from his pay for a Class E allotment of $100.00 per month to be paid to Maud O. Thompson, his mother. It was also undisputed that this authorization was never withdrawn and that no deductions were made from appellant's pay. The trial court at a pretrial conference determined that the only issue was whether or not appellant's mother had received the allotment checks. At trial, the government introduced as evidence of payment a certificate of the United States General Accounting Office showing that 31 checks of $100.00 each for each month from November 1946 through May 1949 made payable to Maud O. Thompson had been negotiated and paid by the Treasurer. By the deposition of appellant's 84-year-old mother, it was shown that she maintained a bank savings account during the period in question which showed deposits of $50.00 each for several of the months while the allotment was in force. Most of these deposits were made during the first of the month. She testified she could not remember receiving any checks of $100.00 from the United States or anyone else during the period in question. She could not remember where the money came from she deposited in her savings account, but during this time she rented rooms in her house, held various jobs, and received money from her son and daughter. On this evidence the trial court found "that pursuant to said authoriza-

tion the United States Government did pay to the defendant's mother, Maud O. Thompson, the sum of $100.00 per month beginning with the month of November, 1946, and each month thereafter until and including the month of May, 1949, or a total of $3,100.00."

Appellant took an appeal in which he raises the questions of limitations, laches, venue, and whether the trial court's overruling of his motion for summary judgment was improper.

The appellant, as one of his first points, argues that there is a statute of limitations which is applicable to this action. He refers to 31 U.S.C., § 129, which in part reads as follows:

> "No proceeding in any court shall be brought by the United States or by any agency or official of the United States to enforce the liability of any endorser, transferor, or depositary, or financial agent, arising out of a forged or unauthorized signature or endorsement upon or alteration of any check, checks, warrant, or warrants issued by the Secretary of the Treasury, the Postmaster General, the Treasurer and Assistant Treasurers of the United States, or by disbursing officers and agents of the United States, unless such proceeding is commenced within six years after the presentation to the Treasurer of the United States or other drawee of such issued checks or warrants for payment of such check, checks, warrant, or warrants, or unless within that period written notice shall have been given by the United States or an agency thereof to such endorser, transferor, or depositary or finanical agent of a claim on account of such liability."

Appellant next refers to 31 U.S.C., § 122, as a limitation on this suit. This section reads in part as follows:

> "Hereafter all claims on account of any check, checks, warrant, or warrants appearing from the rec-

ords of the General Accounting Office or the Treasury Department to have been paid, shall be barred if not presented to the General Accounting Office of the Treasurer of the United States within six years after the date of issuance of the check, checks, warrant, or warrants involved."

An examination of these provisions, together with their legislative history (1957 U.S. Code Cong. & Ad. News, page 1674), indicates that they were not intended to apply to actions of the character now before us. This is a suit for reimbursement of the government for its failure to make proper deductions from the service pay of appellant. The limitations cited are intended to apply against the United States on checks or warrants where there is a forged or unauthorized endorsement or alteration. The second provision fixes a period of time during which claims must be presented on checks or warrants. The facts and the nature of the claim in this case do not bring it within either of these cited statutory provisions. There is certainly no clear intention on the part of Congress that the limitation apply to an action of this character; consequently, there is no statute of limitations applicable to this action.

The appellant next urges that by reason of the inaction of the Federal Government during the time that has elapsed since his discharge and since the last payment was made, the government is prevented by the doctrine of laches from proceeding in this action. Certainly as to its governmental function, the doctrine of laches does not apply to the United States nor to its officers or agencies. United States v. Mack, 295 U.S. 480; San Pedro & Co. v. United States, 146 U.S. 120. Also in the San Pedro case, supra, the court further stated that the doctrine of laches cannot be urged against the United States in situations or

actions where the United States has a direct pecuniary interest. The doctrine of laches does not prevent the government from proceeding in this action although the lapse of time has put the appellant at a disadvantage.

The appellant next urges that the action of the trial court should be reversed by reason of the fact that it overruled his motion for summary judgment. The grounds set out in the motion were that there was a failure to state a claim for the reason that there was no allegation that Maud O. Thompson ever received any of the allotment checks from the government, and secondly that there was no demand made on the appellant for payment. The court overruled appellant's motion and, pursuant to a pretrial conference, stated that the principal issue of fact remaining for the trial was the question of whether or not Maud O. Thompson had received the checks. Considering the pleadings alone, they show that at the time the motion for summary judgment was filed there was this substantial question of fact. A trial court in considering a motion of this character considers the case as a whole, and is not necessarily limited to the precise allegations contained in the pleadings to determine if there does exist a genuine issue of fact to be tried. There was a substantial issue of fact and the court properly overruled the motion. Ziegler v. Akin, 261 F.2d 88 (10th Cir.); Whelan v. New Mexico Western Oil & Gas Co., 226 F.2d 156 (10th Cir.); Brodrick v. Gore, 224 F.2d 892 (10th Cir.).

In his final point for reversal, appellant argues that the trial court lacked "jurisdiction" to try the action by reason of improper venue. It appears that at the time the appellant was served, he was a citizen of Missouri but was served in Kansas. The record also shows that at the time of trial, the appellant had become a citizen of the state of Kansas. The proper venue at the time the action

was brought was in the state of Missouri: however, the appellant waived his objection. Improper venue is of course a defense personal to a party and may be waived. Freeman v. Bee Machine Co., 319 U.S. 448. Waiver comes about most frequently by the party submitting through conduct or through pleading as was done here. The record shows that the appellant filed an answer in which he denied he was a citizen of Kansas, and he denied he was indebted to the United States. No motion was filed raising the venue question, but appellant did file the motion for summary judgment discussed above, in which he requested action by the court and asked for a complete disposition of the case on the basis of his motion. Considering the motion for summary judgment as such or as a motion to dismiss, it is apparent that the appellant voluntarily invoked the judgment of the court. He also filed a counterclaim which has previously been dismissed. Under these circumstances the appellant has waived any objection to venue. Southern Trust Co. v. Austin, 30 F.2d 893 (5th Cir.); Leonardi v. Chase Nat'l Bank of City of New York, 81 F.2d 19 (2d Cir.). It has been held that motions for summary judgment under these circumstances go to the merits of the cause. Hayward v. Public Housing Administration, 238 F.2d 689 (5th Cir.). The trial court found and we agree that no proper objection was made to venue and the motion for summary judgment was a waiver of any objection thereafter.

AFFIRMED.

APPENDIX B

28 U.S.C. 1391 (b)

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

28 U.S.C. 1406 (a)

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

29 U.S.C. 255

Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) If the cause of action accrues on or after May 14 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

31 U.S.C. 122

Hereafter all claims on account of any check, checks, warrant, or warrants appearing from the records of the

General Accounting Office or the Treasury Department to have been paid, shall be barred if not presented to the General Accounting Office of the Treasurer of the United States within six years after the date of issuance of the check, checks, warrant, or warrants involved. . . . As amended August 28, 1957.

31 U.S.C. 129

No proceeding in any court shall be brought by the United States or by any agency or official of the United States to enforce the liability of any endorser, transferor, or depositary, or financial agent, arising out of a forged or unauthorized signature or endorsement upon or alteration of any check, checks, warrant, or warrants issued by the Secretary of the Treasury, the Postmaster General, the Treasurer and Assistant Treasurers of the United States, or by disbursing officers and agents of the United States, unless such proceeding is commenced within six years after the presentation to the Treasurer of the United States or other drawee of such issued checks or warrants for payment of such check, checks, warrant, or warrants, or unless within that period written notice shall have been given by the United States or an agency thereof to such endorser, transferor, or depositary, or financial agent of a claim on account of such liability. Unless a court proceeding shall have been brought or such notice given within the period prescribed in this section, any claim against such endorser, transferor, or depositary, or financial agent on account of such liability shall be forever barred: Provided, that in connection with any claim presented to the General Accounting Office within the time limitation prescribed by section 122 of this title, the period within such a proceeding may be brought or such notice given shall be extended by an additional one hundred and eighty days, and unless

such notice shall be given or a court proceeding brought within such extended period any claim against such endorser, transferor, depositary, or financial agent on account of such liability shall be forever barred. Mar. 6, 1946, c. 48, sec. 1, 60 Stat. 31.

44 U.S.C. 374

Preservation of claims of Government until settled in General Accounting Office; disposal authorized upon written approval of Comptroller General

Records pertaining to claims and demands by the Government of the United States or against it, or to any accounts in which the Government of the United States is concerned, either as debtor or creditor, shall not be disposed of by the head of any agency under any authorizations granted pursuant to the provisions of sections 371, 372, and 373 of this title, until such claims, demands, nd accounts have been settled and adjusted in the General Accounting Office, except upon the wrtten approval of the Comptroller General of the United States. July 7, 1943, c. 192 sec. 9, 57 Stat. 382.

44 U.S.C. 380

Procedures for disposal of records as exclusive

The procedures herein prescribed are exclusive and no records of the United States government shall be alienated or destroyed except in accordance with the provisions of sections 366-376 and 378-380 of this title. July 7, 1943, c. 192, sec. 15, 57 Stat. 383.

APPENDIX C

Rule 12 (b)

How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of Jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

Rule 12 (h)

Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears

by suggestions of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

Rule 56 (b)

For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Rule 56 (e)

Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.